

Foreshore and Seabed Act 2004

The Government closes in on repeal

April 2010

OVERVIEW AND SUMMARY

In response to the ongoing debate in New Zealand concerning the foreshore and seabed, yesterday, on 31 March 2010, the Government released a consultation document in response to its review of the Foreshore and Seabed Act 2004 ("Act").¹

By way of summary, the Government's proposal recommends:

- The Act be repealed;
- The foreshore and seabed be in the 'public domain/takiwā iwi whānui' (ie no longer in Crown ownership);
- New legislation be enacted to detail tests and awards for the recognition of customary interests; and
- Extinguished customary title be restored.

Any new legislation would not change the current treatment of areas in private title, public access, fishing and navigation within the foreshore and seabed, and existing use rights.

The Government has called for further submissions on the proposal detailed in the consultation document by 30 April 2010. No doubt, the proposal won't please everyone.

Business and development interests with activities on the foreshore or seabed, such as fishing, marine farming, marine transport, roading, rail and port and airport infrastructure, mining and tourism should all understand the proposals and how their interests will be affected.

This edition of the Foreshore and Seabed update provides a brief outline of the background to the issues to put the consultation

document in context, as well as summarises the key matters put forward for discussion.

BACKGROUND TO THE ACT

In 1997, eight iwi from the top of the South Island applied to the Māori Land Court seeking a declaration that a certain part of the foreshore and seabed in the Marlborough Sounds was Māori Customary Land. From that beginning, came the Ngati Apa decision on 19 June 2003, which sparked the "foreshore and seabed" debate in New Zealand. The Court of Appeal unanimously held that the Māori Land Court had the jurisdiction to conduct investigations of title into the foreshore and seabed and, in certain cases, convert those areas into private title.

The (Labour) Government's response at the time was to legislate to vest all foreshore and seabed that was not in private freehold ownership in the Crown and remove the Māori Land Court's jurisdiction to investigate Māori customary title over such areas. This was highly controversial and not without its critics, in terms of process, customary rights, and Treaty concerns.

For example, the Waitangi Tribunal found the Crown's proposed policy was in breach of the principles of the Treaty of Waitangi and discriminatory, as it purported to abolish the property rights of only Māori, with other private freehold titles to be protected. There was wider protest. The most significant being the hiko from Northland to Wellington, and the resignation of Government Minister Tariana Turia. At Select Committee stage this dissent was also illustrated by the 3496 submissions, of which 94% were in opposition to the Bill.²

¹ This report can be found at http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004/copy_of_key-documents

² Report by the Fisheries and Other Sea-related Legislation Committee on the Foreshore and Seabed Bill. Retrieved from http://www.parliament.nz/NR/rdonlyres/6E68401F-124D-45A0-8C67-624356BB8BA4/52420/DBSCH_SCR_2912_4814.pdf on 7/12/07 at 3.

KEY FEATURES OF THE ACT

Despite the opposition, on 18 November 2004, the Act passed into law. By way of summary, the Act:

- Vested any foreshore and seabed that was not held in private freehold title in the Crown;
- Removed the Māori Land Court's original jurisdiction over the foreshore and seabed as accepted by the *Ngati Apa* decision; and
- Allowed groups to claim 'customary rights orders', and 'territorial customary rights orders', although these were criticised as being lesser rights than customary title and more difficult to prove.

RESPONSE TO THE ACT

The Act has continued to be criticised and attract controversy.

The United Nations ("UN") has been highly critical of the Act:

- The Committee on the Elimination of Racial Discrimination ("CERD") in a report released on 11 March 2005 found that the Act contained elements that discriminated against Māori.³
- In November 2005, following a visit from the UN's Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, the UN Commission on Human Rights recommended that the Act be repealed and that the Crown should engage in Treaty Settlement negotiation with Māori.⁴

The Government at the time did not act.

NATIONAL RETURNS TO THE HELM - THE REVIEW BEGINS

In November 2008, the National Government came into power. On 16 November 2008, Prime Minister John Key announced a confidence and supply agreement with the Māori Party. As a part of this agreement, National agreed to review the Act to determine whether it adequately maintains and enhances *mana whenua*.

A Ministerial Review Panel ("Panel") was appointed to undertake an independent review of the Act. The panel was chaired by the Honourable Justice Taihakurei Edward Durie (a former Chief Judge of the Māori Land Court, Chairman of the Waitangi Tribunal and High Court Justice); Associate professor Richard Boast (currently at Victoria University); and Hana O'Regan (a distinguished linguist in te reo Maori).

On 1 July 2009 the Panel released its report entitled *Pākia ki uta, pākia ki tai*. The Panel suggested two proposals; both premised on the repeal of the Act. The Panel proposed a National Policy Proposal and/

³ This report can be found at <http://www.converge.org.nz/pma/fs110305.htm> (viewed on the 7/12/07).

⁴ This report can be viewed at <http://www.converge.org.nz/pma/srn-zmarch06.pdf>

or a Regional Iwi Proposal. The Panel also proposed an interim Act which would repeal the current Act and provide an interim framework whilst the final decisions are made.

On 2 November 2009, Cabinet confirmed that it would repeal the Act with the Prime Minister saying it was important to work out what to replace it with rather than rushing repeal. In the months following the Panel's report the Government has been engaged in an extended conversation with iwi representatives and other interested parties to canvass options for an enduring solution.

THE GOVERNMENT'S PROPOSAL

On 31 March 2010 the Government released *Reviewing the Foreshore and Seabed Act 2004*, which outlined the Government's proposal and calling for further submissions on specific questions.

The key elements of the Government's new proposal are:

- Repeal of the 2004 Act;
- Foreshore and seabed to be in the "public domain/takiwā iwi whānui" (ie no longer in Crown ownership);
- Public access affirmed;
- New legislation to be passed;
- Extinguished customary title to be restored; and
- Legislated tests and awards for the recognition of customary interests.

The Government's proposed regime would mean that no one would own the foreshore and seabed (except existing land held in private title). This is a new concept for New Zealand law, and instead of identifying an owner of the public foreshore and seabed, the proposed legislation (which has not yet been released) would specify roles and responsibilities within it. The Crown and local government would continue to have regulatory responsibility with input from those coastal hapu / iwi groups granted awards under the new Act.

The Government has been careful to emphasise that the treatment of areas in private title, public access, fishing and navigation within the foreshore and seabed, and existing use rights will not change from the current situation. However, the grant of future rights could be significantly impacted particularly if customary rights are recognised over areas where development etc is proposed or likely.

Determining and recognising customary interests under the proposed regime

Customary rights would continue under the Government's new legislation. A coastal hapu/iwi could make a claim for recognition of their customary interests by either:

- Direct negotiations with the Crown; or
- Accessing the courts.

The Government favours having legislation which sets out explicitly

how customary interests are to be determined and recognised (ie the tests and awards applied). The Government's proposal is that new legislation would recognise two types of customary interests being non-territorial (customary uses, activities and practices) and territorial (customary interests that are territorial in nature and extent).

Non-territorial customary rights

In developing the test for the recognition of non-territorial customary interests the Government has considered Canadian common law and Te Ture Whenua Māori Act 1993. The new test would recognise a non-territorial interest carried out by a coastal hapu/iwi in the relevant foreshore and seabed area is recognised where it:

- Has been in existence since 1840;
- Continues to be carried out in accordance with tikanga Māori in the area specified by the applicant; and
- Has not been extinguished.

This test removes the requirements for the activities to be 'integral to tikanga Māori' and for the activities to have been carried on 'in a substantially uninterrupted manner since 1840' therefore lowering the threshold under the current Act.

The Government has proposed three awards for proven non-territorial interests. The awards would apply only within the area where the interest has been proven:

- Customary activities to have a protected status;
- Placement of rāhui over wāhi tapu; and
- A Planning Document setting out hapu/iwi objectives and policies which local authorities would have to take into account when assessing resource management issues.

Territorial customary interests

The proposed test for territorial customary interests is similar to that in the current Act however it lowers certain thresholds. The proposed test:

- Uses tikanga Māori;
- Removes the requirement of 'continuous title to contiguous land' as a requirement that must be met;
- Clarifies that fishing (in addition to rights of navigation) by third parties does not prevent a finding of "exclusive use and occupation";
- Ensures that customary transfers of territorial interests between hapu and iwi post-1840 are recognised as legitimate; and
- Allows for 'shared' exclusivity between coastal hapu/iwi as against other third party interruptions.

An award for territorial interests would be called 'Customary title' and would include:

- A right to permit activities;

- Participation in conservation processes; and
- A Planning Document (the same as what would be awarded if non-territorial customary rights were granted).

Other key matters

Further to the above, the Government has developed proposals on other specific important matters namely:

- Who can use areas of the foreshore and seabed (allocation of space);
- Structures;
- Reclamations;
- Local authority-owned land; and
- Adverse possession and prescriptive title.

Of particular interest the Government has called for submissions on the Crown's proposal:

- To continue to delegate the role of allocating coastal space to regional councils (in conjunction with those hapu/iwi whose customary interests in the area have been recognised);
- To affirm the ownership of existing structures with existing owners, but for new structures to be owned by those who own the material in the structures and for coastal hapu/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures;
- For existing reclamation applications to continue to be dealt with as though the Crown were the owner of the underlying land and for new applications, for local authorities to continue to perform their current role of considering the environmental effects of a proposed reclamation;
- That port companies would be able to obtain a permit for structures that would provide for an interest akin to a leasehold interest in a reclamation for 50 years **or more** (compared with a maximum of 35 years for a coastal permit);
- That any existing local authority-owned land within the foreshore and seabed (ie, purchased subsequent to the Act) would be incorporated into the 'public domain/takiwā iwi whānui' with the Crown paying compensation for that land to the local authority;
- That the new legislation contain similar provisions to the current Act with respect to adverse possession and prescriptive title (the current Act provides that no person may claim an interest in any part of the foreshore and seabed on the grounds of adverse possession or prescriptive title); and
- To address 'other matters' yet to be decided, namely leases and licenses, coastal occupation charges, roads and local Acts - this could have significant implications.

The Government recognises that this is not an exhaustive list of

matters that need to be addressed and welcomes submitters' views on other matters concerning the foreshore and seabed whether they are referred to in the consultation document or not.

WHERE TO FROM HERE?

The Government has called for submissions on the consultation document by **30 April 2010**. Between now and then the Minister of Māori Affairs, the Associate Minister of Māori Affairs and the Attorney-General will be attending hui and public meetings around the country consulting with interested parties. Following this consultation round the Attorney General will report to Cabinet with the final Cabinet decision expected in late May and June 2010.

If the decision is made to repeal the current Act and enact new legislation, the public will have another opportunity to provide input into the proposed legislation during the Select Committee process.

WHO SHOULD MAKE A SUBMISSION?

The Government has provided an opportunity to make very general submissions on a wide range of issues pertaining to the foreshore and seabed. The following groups should have a vested interest in the outcome of the Government's proposal and should look to make a submission:

- Coastal hapu / iwi; and
- Business and development interests with activities on the foreshore or seabed such as; fishing; marine farming; marine transport; roading; rail; ports; airport infrastructure; mining and tourism.

We are more than happy to discuss possible submissions with you so that you are able to have input into this process. Please do not hesitate to contact us at any of the numbers below.

The publication is intended only to provide a brief summary of the subject covered. It does not constitute legal advice and should not be relied on as such without first obtaining specific professional advice based on your unique circumstances

Russell McVeagh has New Zealand's longest established and most experienced environmental and resource management practice. Our National Resource Management Group operates in both Auckland and Wellington, with clients in almost every district in New Zealand.

If you have questions about how the mining reform might affect you, or how you can effectively engage on the issues that do affect you, please contact the partner/solicitor in the firm who normally advises you, or alternatively contact:

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